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In the Supreme Court of the United States

No. 371

Reply to Briefs in Opposition to Petition for Writ of Certiorari

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 371

OLIVER J. OLSON & Co., a Corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a Corporation,
Respondents.

Reply to Briefs in Opposition to Petition for Writ of Certiorari

Respondents' Reply Briefs miss the import of this Petition for Certiorari. The petition necessarily related the facts; respondents attack that statement and thereby imply that the petition seeks a review of these facts. This is not the case.

Petitioner seeks review of the proceedings in the Court of Appeals because Petitioner was denied its rights to a review of the District Court's decision under the standard pro-

scribed by Rule 52(a) of the Federal Rules of Civil Procedure. The replies of respondents avoid this issue. Respondents merely suggest that the same result might have been reached by the proper standard of review. Perhaps it might and perhaps not. It is pure speculation to say what the Court of Appeals would have concluded about the facts if it had applied the proper standard of review. The basis of Petitioner's position is that it is entitled to have the case re-appraised by the Court of Appeals in the light of the correct standard.

The Court of Appeals announced the principle upon which it acted. It required Petitioner to establish error in the District Court beyond the possibility of dispute. In this it erred.

Respondents dispute certain facts referred to in Petitioner's narrative, but that is not enough. The Court of Appeals either disregarded these facts or refused to give weight to them, solely because they were not established *beyond doubt*. If it had recognized that these facts did not have to be established beyond doubt and, after then weighing them, still found otherwise, there would be a different case.

The Petition stated that the District Court's opinion contained findings which were contradictory and therefore the Court of Appeals should have remanded. Virtually all of the contents of respondents' briefs are directed to this point. To sustain the testimony of the Luckenbach witnesses, respondents argue that the trial court's finding that the Olson was on a 320 degree course and stayed on that course until shortly before the collision is incorrect. This is an admission that the trial court's findings do not support its judgment, and this confirms Petitioner's contention that the courts below misapprehended the effect of the evidence.

and that under the proper application of Rule 52(a) the cause should have been remanded to the District Court.

The evidence relied upon by the District Court constitutes a physical impossibility, and respondents are careful not to claim that it was physically possible.* The error of the Court of Appeals which is the basis of this Petition lies not in finding that it was, or was not, possible; the error is in its complete failure to weigh that evidence against the highly probative evidence to the contrary, and in further stating that the "highly probative evidence" would have to be free of possibility of errors and "beyond dispute" before it could outweigh evidence labelled as credible by the Trial Court.

It is respectfully submitted that the writ should issue.

Dated: September 28, 1960.

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*Luckenbach's brief refers to a chart (Luckenbach Exhibit 21) prepared by its expert showing that the collision could have occurred on "meeting courses". That is not the point. That very chart shows that on the courses there depicted the Olson would be showing to the Leopard only its green light, and not both red and green as required to bring the approach within the mandate of Article 18 of the International Rules for Navigation at Sea.